

RICHARD E. GIFFORD PLLC

October 4, 2013

Rick Gifford  
E-mail: rick@rgiffordlaw.com

RECEIVED  
OCT - 4 2013  
DEVELOPMENT SERVICES  
COUNTER

Mr. Kernen Lien, Senior Planner  
City of Edmonds, Planning Division  
122 – 5<sup>th</sup> Avenue  
Edmonds, Washington 98020

**Hand Delivered**

Re: PLN20130022, 50 Pine Street, Edmonds, Reply to APL20130006

Dear Mr. Lien:

The following materials are submitted on behalf of Edmonds Pine Street LLC (“Applicant”) in reply to (1) the appeal (“Appeal”) of Thomas R. Waggener, et al. (“Appellant”) of the Architectural Design Board’s (“ADB”) May 16, 2003 decision in this matter, and, (2) supplementary argument in support of the Appeal from Douglas Purcell, Appellant’s attorney, dated and filed with the City on September 27, 2013.

This letter incorporates by reference Sections I-III of Applicant’s reply, also submitted to you this date, to the Town of Woodway’s Appeal of the ADB’s decision.

All citations herein to the Record are by reference to the appropriate page or pages of the written record prepared by the City for this matter. Citations to the May 15 ADB transcript are shown “Transcript at \_\_\_\_”. Citations to the ADB’s approved Findings, Conclusions and Decision dated August 7, 2013 (“FC”) are shown as “FC \_\_\_\_”.

A. Response to Appellant

The Appeal rests principally on opinion, interpretation, and repetitions of staff advisory comments to the ADB, not factual showings. In summary, Appellant fails to meet the burden of proof required to justify modification or reversal.

1. The Record Supports ADB’s Decision (Response to Appeal, Attachment 1, page  
As acknowledged by staff in the May 9, 2013 Planning Division Report (“SR II”), this

proposal technically is a new application, but has a long history and arose in an existing context. Record 0005, 10; 0453-62; 0481-512. It was modified at the Board's direction last December and incorporates the Board's explicit instructions and guidance. Transcript at 2-3, 27-28; Record 0485-88.

The ADB's December terms [Record 0003, 0005] were the kind of helpful "specific direction and guidance to applicants" required from the City under ECDC 20.11.020(A). The Urban Design Guidelines (UDGs) in the City's Comprehensive Plan are the primary means of meeting this requirement and the standard against which design is measured. Id.; Record 0010 (SR II, Part VI.3.B); FC Conclusions 2, 3. The Board supplied Applicant with consistent direction under the UDGs in December, and confirmed design conformance at the May 15 hearing. Record 0003; Transcript at 27, 28.

The May 15 Record is extensive. In all, it consists of well over 500 pages of written material, in addition to a 28-page hearing transcript, and 26 pages of detailed findings of fact and conclusions of law.

The Board is charged with authority and responsibility to review any development requiring SEPA review, as this one does, in a public hearing, and render a decision. ECDC 20.11.020; FC Conclusion 1. The Board conducted the required hearing, considered all evidence, rendered its decision, and adopted the FC. The Board's design determinations and the FC are supported and sustained by the Record in detail, and as a whole. Id.

As directed by the Council on remand, at its August 7, 2013 public meeting, the Board reviewed draft findings and conclusions drawn up by staff, deliberated, made certain changes to ensure consistency with the Record and its decision, and, unanimously adopted the FC.

Appellant deems 33 findings and conclusions in the FC to be clearly erroneous, without offering support or explanation. Likewise, Appellant's attorney asserts without substantiation that the Board's findings and conclusions, in general, "are not supported

by the record". He refers to Appellant's laundry list of offending findings and conclusions but declines to "belabor" them, meaning he offers no viable evidence or argument in support of the contentions. Instead, he offers generalizations, minimizes and demeans the Board's efforts, and questions the good faith of the exhaustive process that was imposed by the Council. Whatever this sort of blustery "argument" is intended to accomplish, Appellant is shooting blanks, ignoring the record, and sidestepping the factual, Record-based showing that is required. The facts and evidence to substantiate Appellant's claims simply do not exist.

By contrast, the attached Schedule 1 provides, for each of the disputed findings and conclusions, citations to the Record, to the Transcript, and to the FC, for the Council's convenience in surveying the actual evidence presented and considered.

2. Appellant Over Weights Staff Suggestions to the Board and Argues Selectively (Appeal Attachment 1, pages 1-2, 4, 6, 8))

Appellant apparently believes that it is City staff that has decision making authority in design review matters under ECDC 20.11.010. Staff plays an important role, to be sure, and exercises primary responsibility for confirming compliance with bulk and use standards under the zoning ordinance. Staff input to the ADB on design is allowed and even expected, but is advisory only. Staff fills a secondary, supporting role in this design review process. The ADB must exercise its informed, independent judgment regarding design issues, on the whole record. ECDC 20.11.020(A).

Staff determinations on development standards receive deference. ECDC 20.11.020(B). Aesthetic, architectural, style, and other aspects of design review are the province and prerogative of the ADB. ECDC 20.11.020(A). The ADB conducts the hearing, considers all relevant information in the record and City Code and policy, and renders its design decision accordingly. The ADB, not staff, is the designated decision maker in the case of any public hearing on design review under ECDC. Ch. 20.11, and acts in the place of staff for such applications. ECDC 20.11.010(A)(1). Staff input to the Board is invited and considered, but is not controlling. E.g., Transcript at 26-28.

Appellant's strategy is one of picking and choosing to suit the issue. Where Appellant likes staff's position, that position is stressed. Where staff and Appellant disagree, Appellant ignores or disputes staff. Likewise, Appellant similarly highlights or ignores particular design guidelines. The determining factor appears to be what approach best serves Appellant's goal to overturn the Board's decision.

The design review process is holistic, covering all relevant considerations (some 75 UDGs). See Record 0010-15, 0058-60; FC Conclusion 4.a. It is not a process of picking those one likes and leaving the rest, or placing one or a few select guidelines above the others. Each of the guidelines is meaningful and important and best effort must be made to account for all in a comprehensive design review. This is the task assigned to the ADB, and how the Board conducted its review. Transcript at 27-28.

Code section 20.11.030(A)(4) exemplifies the coordinated weighing and balancing process that is involved:

"Long, massive, unbroken or monotonous buildings shall be avoided . . . This criterion is meant to describe the entire building. All elements of the design of a building including the massing, building forms, architectural details, and finish materials contribute to whether or not a building is found to be long, massive, unbroken or monotonous."

Expanding on this concept, the Code mentions various building architectural/design features that contribute to and mitigate a building's mass in multi-family zones: windows with architectural fenestration; multiple rooflines or forms; architecturally detailed entrances; appropriate landscaping; the use of multiple materials. Id. The subject design contains all of these elements, some introduced or adjusted in response to ADB direction, and others that contribute to a compliant overall design as approved by the Board. Record 0023-75, 0453-78, 0486-90; 11-17, 26-28; FC.

In the same way that all elements of a building must be taken into account in comprehensively assessing its mass and presentation, all applicable design guidelines and considerations are part of an integrated design review. The ADB had input from staff, from Appellant and other interested parties, from the Applicant and its architect

and legal counsel, as well as its own background and guidance given on the design issues at the December hearing.

The question presented to the Council on closed record review is whether the Appellant has established by substantial and convincing evidence that the Board's decision was clearly erroneous. The staff's determinations on zoning code compliance (incorporated into the decision), and the ADB's findings and conclusion regarding design approval, are to be upheld absent a lack of support in the record and compelling contrary evidence. It is not a matter of opinion or substituted judgment, but of proof.

Appellant relies on non-expert opinions and interpretations, purely advisory suggestions from staff, and a customized mixture of UDGs, and fails to demonstrate clear error on the part of the Board based on the controlling Record.

3. The Board's Refusal to Require Removal of a Floor or Other Intrusive Structural Changes is a Valid Exercise of Discretion Supported by the Record.

Mr. Lien surprised everybody when he suggested the Board make the Applicant "lop out" a floor from the east wing to "step" the building from east to west. Record 0013, 18; Transcript at 4 [K.Lien testimony]. This came out of nowhere.

Nothing along these lines was said during pre-application review, in the first staff report for the December 2012 public hearing (although the structure, height, and overall building mass/bulk were the same), at the December hearing, or during project re-design. See Record 0226, 0240-243; 0488-490.

That staff had not thought this through was evident when, at the hearing, Mr. Lien backed away from his statements, explaining that they were "simplistic" and incomplete and now felt that other design techniques having a similar visual effect, "while maintaining five stories", would be acceptable and receive staff support. Transcript, Lien Testimony, at 4. Nothing further was suggested by staff.

The Board questioned Mr. Lien on the record, seeking clarification, and came back to the issue during deliberations. Transcript at 5-6, 26-28. Applicant spoke to the issue on the Record and objected to any such requirement as unnecessary under the

UDGs and inappropriate in substance and timing. Transcript at 12-13. The Board agreed and chose not to impose such a condition. Id. at 27-28.

Appellant sticks with Mr. Liens abandoned “simplistic” thought, and in fact, re-doubles it by asking that a full floor be lopped out of each wing of the building. This notion does not even appear in the Record, much less have any credible support. Transcript at 4,-6, 27-29. It is a stab in the dark.

4. Approved Modulated Roof Design (Attachment 1, page 4)

The proposal includes a modulated roof design. Record 0453-62; 0474. Applicant’s architect addressed this explicitly in the design packet and in his presentation to the Board. Id.; Transcript at 14-16. Staff did not contest this evidence, nor did any other party of record. Staff correctly confirmed that the modulated design determination was for the ADB to make. Record 0008; Transcript at 3.

Staff acknowledged on the record that the City’s Code allows a five-foot height bonus for modulated roof design, but does not specify standards for modulation in ECDC Ch. 16.75, the governing zoning provisions. However the Code does contain guidance that the Board has used on many occasions. Applicant presented a comparison roof modulation standard from another section of the Code and described the consistency of this standard with the subject proposal. Record 0459, 0474, 0512. This, too, was uncontested. The ADB agreed with the Applicant and approved the roof as a modulated design. FC, Conclusions 4.a.D.3.a and 8.b.

5. Parking Standards Are Met (Attachment 1, page 4)

Staff found the proposal fully compliant with City parking standards Record 0009-10. The City’s Parking Code does not require underground parking. ECDC Ch. 1750; Transcript at 4-6. Surface parking is allowed. Record at 0009-10.

Although the City cannot require underground parking, the proposal provides nearly half of its parking below grade (70 stalls), with 74 surface spaces. Record 0010, 0057; Transcript at 3, 5-6. The 144 spaces exceeds the parking requirement, and is fully compliant with ECDC Ch. 17.50 parking standards. Record at 0010; Transcript at 5.

As a design element, the Board considered and required additional planting, trellising, and other design amenities to provide increased screening for the surface parking area. Record 0003, 0080-82. A concept plan for the larger project approved in 2003 surface parking on this site, as did the detailed design for Building 10 first approved by the ADB in 2006. Transcript at 6; Record at 0205, 0217-18, 0493, 0496.

6. Height Calculation (Attachment 1, pages 6 and 7)

The Code supplies definitions and a height calculation methodology. In the pre-application review phase, Applicant's architect conferred with staff and received direction and confirmation regarding the height calculation for this project. Staff repeatedly has approved the method and resulting height calculations. E.g., Record 0008-9; Transcript at 3-6. 13. The height calculation method used in the design with advance staff approval is explained in detail in SR II. Record 0008-9, 0017. Staff's assessment and approval is entitled to deference, is consistent with Code provisions and past City practice, was considered and approved by the ADB, conforms with the Code, and is supported by the Record. Appellant offers a convoluted interpretation of the Code that contradicts the language of the Code, misinterprets some aspects, overlooks past practice, and completely disregards staff's informed assessments, which receive deference. The contentions are baseless.

Appellant's assertion that a five-story building could not be built elsewhere in the Edmonds "bowl" is outside the record and, in any event, immaterial. The issue is what the City's Code and practice allow for THIS SITE given its topographic characteristics. Allowed height depends on Code standards and particular site characteristics, not hypothetical extrapolations. Staff has approved and confirmed the height calculation and the project's compliance, and the Board properly accepted that determination. FC Findings 10, 13, Conclusions 8.b, 10.

7. Appellant Would Supplant Express ADB Conclusions with Non-binding Staff Commentary (Attachment 1, page 8)

Appellant argues with the ADB over the meaning of its own clear statement that the re-design accomplished what it sought in its directives and now aligns with the

design guidelines. Transcript at 27-28; FC Conclusion 4. The Board clearly ratified and approved the revised design as both meeting the City's design criteria and fulfilling its specific directives during the December 2012 hearing (Transcript at 27-28; CF) yet Appellant claims otherwise, once again leaning on precatory staff comments for support, as if it does not matter what the Board said or decided. The Board issued the directives, and the Board itself confirmed that the new design satisfies those directives fully while complying with the broader sweep of the UDGs as a whole. Id. The Board considered staff's input along with other material in the Record before making its decision.

Appellant wishes the Board had required major structural adjustment to the building when it gave direction to the Applicant in December, and suggests that is what the Board meant, based on disconnected comments by staff in SR II. But the Board's December re-design order, recorded verbatim in the Record, says nothing of the sort, and the Board did not state otherwise at the May hearing. In fact, the Board, like Applicant, clearly was caught off guard by staff's surprise suggestion, and questioned staff quite extensively about it and about the final shift in meaning given by Mr. Lien. The idea was no part of the ADB's guidance to Applicant in December, and was excluded purposely from the Board's decision in May. The Record is not limited to the Board's four instructions, nor was the Board's consideration, as the FCs clearly show. Appellant is engaging in wishful thinking and creative reconstruction.

While Appellant argues that the Board should apply its December 2012 directives (though in the manner desired by Appellant), Appellant's attorney asserts they should have no bearing on the Board's thinking or its decision. The fact is that the Board supplied direction to the Applicant in a good faith effort to provide helpful guidance, and Applicant accepted the input revised its design in a good faith effort to comply. The Board now has undertaken a thorough, independent review of the revised design, finding it in conformance with Code, Plans, and policy, and at the same time, responsive to and consistent with its December instructions. Transcript at 26-28; FC



Conclusions 2-5, 7-12. It rendered its approval accordingly, supported by the record on review.

8. Extensive Evidence in the Record and the History of the Project Support the Board's Decision to Conditionally Approve the Revised Design

This proposal has been vetted by staff and the ADB through 17 months of processing that has encompassed pre-application review with two all-hands staff meetings, project submittal, an initial public hearing in December 2012, re-design of the project in response to specific ADB direction, new SEPA review required by the City mid-stream, a new, stand-alone parking study demanded by the City, and a second public hearing during which the revised design was again intensely scrutinized by the public, staff, and the ADB. Record 0004-6, 0240, 0481-90. The effort has been exhaustive.

Applicant has been proactive and forthcoming about the design from the outset, and thorough in its submittals. Everything required requested by the City, and more, has been provided.

The core of the building--size, shape, mass, footprint, landscaping, parking plan and configuration, amenities, and other important elements are unchanged, except for revisions validly stipulated by staff and/or the ADB. Record 0460-62, 0468-69, 0484, 0487-89, 0503-05.

The ADB-ordered re-design was conducted in good faith reliance on the Board's input. At the end of the day, the ADB exercised its authority and discretion, conditioning its final approval on a few design refinements urged by staff. Record 0003; Transcript at 28-29.

9. The Supplementary Argument Adds Nothing of Substance or Merit to the Appeal

Mr. Purcell's letter is of little import. He objects to various aspects of the design process, such as staff-verified height calculations and the Board's adoption of the FC as directed by the Council, but offers no evidentiary support from the record. Applicant agrees that the remand step was awkward, but it was necessary to ensure proper and complete process under the City's design review protocols.

Mr. Purcell echoes the general, unsubstantiated charge that the Board's decision and the FC's supporting it, are clearly erroneous. No proof whatsoever is offered. His reference to ECDC 20.11.030(A) is misleading and incomplete. That Code section explicitly adds that all aspects of a building and its architectural design contribute to the assessment of its mass and scale, and references particular elements that are a distinct part of this proposal. No one disputes that this building will exist in a context and that consideration needs to be given to surrounding development. This is precisely what the Board asked Applicant to do in December, Applicant responded, and the Board endorsed the design as responsive and much more compatible with surrounding buildings and site features. Transcript at 27-28.

Mr. Purcell's references to Record 0210 and 0257 appear to be intended to refer to Record 0088-89 and 0139. The first reference is not to the City's prior design analysis but to Provision B.6 in a narrative prepared by the developer about Point Edwards, noting basic characteristics of buildings with two and three residential stories (some of which also had additional exposed stories containing underground parking). The second reference is an excerpted page from the former Edmonds Downtown Waterfront Plan, now superseded by the Urban Design Element and UDGs in the Comprehensive Plan and no longer relevant. It is the current UDGs that matter.

Like Appellant, Mr. Purcell over weights staff opinions and suggestions. The Board is obligated to make these determinations based on the Record and its informed judgment. It is not a rubber stamp for staff.

The density concentration information on page 4 of his argument also is misleading. It is more meaningful to compare the proposed Building 10 footprint to the total developed footprint at Point Edwards, a 13% ratio. More instructive is that just 42.9% of the available land area at the 50 Pine Street site will be covered, well below the limit of 75% lot coverage allowable per individual lot.

Mr. Purcell suggests that the Board relied exclusively on its December 19 directives in approving the proposal. His interpretation flies in the face of the Record and the Board's explicit findings and conclusions. The entire record must be considered, not

merely the Board's summary discussions at the end. The standard is the record as whole. The Board determined that it was neither necessary under the City's design criteria, nor appropriate, to compel further major design changes, and so omitted any reference to floor removal or building "step" requirements. That staff had a different "opinion" can be acknowledged, but is neither relevant nor probative.

Mr. Purcell repeats his truncated and misleading quotation of portions of ECDC 20.11.030(A) with respect to approved modulated roof design. This issue was thoroughly addressed in Appellant's presentation, other parts of the Record, and staff commentary, as previously noted. Mr. Purcell introduces his own notion about modulated roof design, to the effect that it is not the modulation, but the appearance of modulation that matters, and, in particular, as viewed by pedestrians walking along Pine Street. This is a unique view, nowhere presented in the Code or UDGs. It is nothing more than one man's non-expert opinion and has no relevance or bearing in these proceedings.

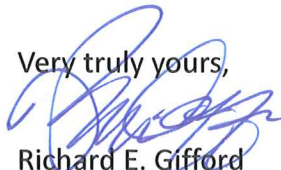
Disapproval and disagreement are insufficient to overturn the presumptively valid decision of the ADB. They are supported by evidence in the Record and consistent, comprehensive findings of fact and conclusions of law. Appellant has not met its burden of proof. The ADB's decision should be upheld in all respects.

B. Conclusion; Requested Relief

The Record supports the Board's decision. Appellant has not met, and cannot meet, its burden of showing the decision to be clearly erroneous. Applicant respectfully requests that the Council affirm the ADB's decision.

Thank you for the opportunity to submit this reply to the Appeal. The Applicant appreciates the Council's consideration of this matter.

Very truly yours,



Richard E. Gifford  
Attorney for Applicant,  
Edmonds Pine Street

REG/mmi

**Schedule 1**—Supporting References to the Record**Findings of Fact:**

**13** (Record 0008-9, 0017, 0031, 0051, 0238, 0488, 0491; Transcript at 3-5); **20** (Record 0459, 0474, 0491, 0512; Transcript at 3); **22** (Record at 0023-25; 0460; 0486-90; Transcript at 12, 14-15, 26-28)

**Conclusions of Law (and Mixed Findings and Conclusions):**

**2** (Record 0010-11, 0058-60; 0488-0490; ECDC 20.11.020(A)); **3** (Record 0010-11; ECDC 20.11.020(A)); **4.a** [**C.2.a** (Record 0009-11; 0016; 028); **C.6.b** (Record 0008, 0012-13, 0024-25, 0035, 0041); **C.7.a** (Record 0014-15, 0042; Transcript at 17-18); **C.8.a** (Record 0023-25, 0059-60, 0469, 0474; Transcript at 14-16); **C.8.b** (Record at 0012 [Part K], 0058; Transcript at 3, 12, 15-16, and 28 [Board Member Guenther]); **C.8.c** (Record 0034, 0456-58, 0060; Transcript at 28); **C.8.d** (Record 0034, 0060m 0456-58; Transcript at 15-16, 28); **C.13.a** (N/A as no significant landscape features exist other than the boulder retaining wall that will remain as part of the project); **C.13.d** (Record 0037, 0039-40, 0051, 0070, 0072, 0074, 0139-40, 0201-03, 0456-0458, 0461-62; Transcript at 14); **C.14.c** (Record 0012, 0015-16, 0024, 0052-58, 0060, 0462, 0475, 0489; Transcript at 17); **D.1.b** (Record 0034, 0056-58, 0060; Transcript at 15, 16, 28); **D.2.a** (Record 0011, 0024, 0027, 0036, 0038-44, 0058-60, 0462); **D.2.b** (Record 0024, 0028, 0031, 0036, 0038, 0041-42, 0060, 0070-75); **D.2.c** (Record 0012, 0014-16; 0035-36, 0038-39, 0041, 0059-60, 0459, 0474); **D.3.a** (Record 0008, 0038, 0060, 0459, 0474, 0491-92, 0512; Transcript at 3, 16); **D.3.b** (Record 0011, 0024, 0027, 0036, 0038-44, 0058-60, 0462); **D.4.b** (Record 0012, 0014-16, 0024, 0028, 0031, 0035-36, 0038-39, 0041-42, 0059-60, 0070-75, 0459, 0474); **D.4.c** (Record 0012, 0014-16, 0024, 0028, 0031, 0035-36, 0038-39, 0041-42, 0059-60, 0070-75, 0459, 0474); **D.4.e** (Record 0034, 0056-58, 0060; Transcript at 15, 16, 28); **E.1.b** (Record at 0034-36, 0038-41, 0060, 0354-56, 0474); **E.1.c** (Record 0026-61; 0459-62; Transcript 14-18, 28); **E.1.e** (Record 0026-61, 0459-62; Transcript at 12, 14-16, 28); **5** (Record 0007-10, 0011 [Part F], 0015-16, 0017 [Staff Summary Point No. 1]); **6** (Record 0030, 0033, 0053, 0109-0127 and 0160-0179 [Point Edwards approved Master Plan, 2002], 0182-86 [approved MP zoning for Point Edwards site, ECDC Ch. 16.75], 0455, 0466, 0467, 0482-83, 0493, 0494, 0495, 0496, 0497, 0501; Transcript at 12-13, 14-16); **8** (Record 0007-10, 0225-228, 0238; Transcript at 2-6 [K. Lien testimony]); **9** (Record 0007-10, 0011 [Part F], 0015-16, 0017 [Staff Summary Point No. 1], 0028); **10** (Record 0007-10, 0011 [Part F], 0015-16, 0017 [Staff Summary Point No. 1], 0028); **12** (Record 0024, 0027-30, 0033, 0053, 0069-75, 0109-0127 and 0160-0179 [Point Edwards approved Master Plan, 2002], 0182-86 [approved MP zoning for Point Edwards site, ECDC Ch. 16.75], 0455-58, 0466, 0467, 0482-83, 0487-90, 0493, 0494, 0495, 0496, 0497, 0501; Transcript at 12-13, 14-16; ADB Findings 10, 12, 13, 14, 21, 21)